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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EL PUEBLO PARA EL AIRE Y AGUA LIMPIO et al.,

Plaintiffs and Appellants,

v.

KINGS COUNTY BOARD OF SUPERVISORS,

Defendant and Respondent;

CHEMICAL WASTE MANAGEMENT, INC.,

Real Party in Interest and Respondent.

F062297

(Super. Ct. No. 10C0017)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

California Rural Legal Assistance, Inc., Kara E. Brodfuehrer, Phoebe S. Seaton, Cynthia L. Rice, Juan Carlos Cancino, Ron Kurlaender, Ilene J. Jacobs; Center on Race, Poverty & the Environment, Ingrid Brostrom, Brent Newell and Alegria De La Cruz for Plaintiffs and Appellants.

Relman Dane & Colfax, D. Scott Chang and Reed N. Colfax as Amici Curiae on behalf of Plaintiffs and Appellants.

Colleen Carlson, County Counsel, Johannah L. Hartley, Deputy County Counsel; Hogan Guiney Dick and Michael M. Hogan for Defendant and Respondent.

Remy, Thomas, Moose & Manley, Remy Moose Manley, Andrea K. Leisy and Amanda R. Berlin for Real Party in Interest and Respondent.

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INTRODUCTION

Following approval of a project to expand an existing hazardous waste disposal facility located in Kings County (County), plaintiffs/petitioners and appellants Greenaction for Health and Environmental Justice (Greenaction) and El Pueblo Para El Aire y Agua Limpio (Pueblo) (collectively appellants) filed a petition for writ of mandate and complaint alleging violations of the California Environmental Quality Act (CEQA)[1] and civil rights causes of action (Gov. Code, §§ 11135, 12955, 65008). The trial court sustained demurrers to the civil rights causes of action and rejected the claims of CEQA noncompliance. This appeal followed.

Appellants argue the demurrers should have been overruled and the environmental impact report (EIR) that was certified for the project did not adequately analyze the project's health, transportation and cumulative impacts. We conclude: (1) the demurrers

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1 CEQA is codified at Public Resources Code section 21000 et seq. CEQA is implemented in the Guidelines for the Implementation of the California Environmental Quality Act, commonly referred to as the CEQA Guidelines, which are contained in title 14 of the California Code of Regulations, section 15000 et. seq. "'The CEQA Guidelines, promulgated by the state's Resources Agency, are authorized by Public Resources Code section 21083. In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized or erroneous.'" (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319, fn. 4.) Unless otherwise specified, all citations to the CEQA Guidelines are to title 14 of the Code of Regulations.

to the civil rights causes of action were properly sustained without leave to amend; (2) the health impacts arguments are meritless; and (3) administrative remedies were not exhausted on the transportation and cumulative impacts claims. The judgment will be affirmed.

FACTUAL OVERVIEW AND PROCEDURAL BACKGROUND[2]

In 1979, real party in interest Chemical Waste Management, Inc. (CWMI) purchased and began operating the Kettleman Hills Facility (KHF), which is one of two currently active permitted hazardous waste disposal facilities in California.[3] The KHF is located in a rural western portion of the County, approximately 3.5 miles southwest of Kettleman City (KC), 6.5 miles southeast of Avenal, 2.5 miles west of Interstate 5 and one mile from Highway 41. The closest residence is located approximately 2.5 miles away from the KHF boundary and there are no other permanent residences within 3.5 miles. "The closest sensitive receptors (schools, hospitals, daycare centers, or eldercare facilities) are in [KC] approximately 6 kilometers (3.7 miles) from the [KHF boundary]."

In 1985, the Kings County Board of Supervisors (Board of Supervisors) approved expansion of the KHF site from 1,280 to 1,600 acres, construction of three landfills (designated as B-17, B-18 and B-19) and operation of additional hazardous waste

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2 "We reserve a detailed account of the facts for the discussion portion of this opinion. A basic outline of the facts is nevertheless provided to frame the issues." (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 81 (*Cadiz*).)

3 Manufacturers across the United States are required under federal regulations to dispose of their hazardous manufacturing wastes in specially permitted hazardous waste disposal areas, commonly known as landfills. In California, manufacturers are required to dispose of additional waste products, commonly referred to as California State Hazardous Waste, in specially permitted landfills. There are 17 commercial landfills with federal and state permits to accept regulated hazardous waste in the United States. CWMI operates five of these landfills which are located in Alabama, California, Louisiana, New York and Oregon. The other landfill in California is located in Buttonwillow, which is in Kern County, and operated by Clean Harbors, Inc.

treatment and disposal facilities (the 1985 project). The 1985 project permitted a total of 474 acres within the site to be used for operations to treat, store and dispose of hazardous waste and municipal solid waste. An EIR was prepared and certified for the 1985 project. Subsequent EIR's were prepared and certified for separate projects in 2005 and 2006 to permit the B-19 landfill to operate as a class II/III landfill, with a portion being a bioreactor, and to permit the B-17 landfill to operate as a class II/III landfill.[4]

I. The CEQA Process.

The B-18 landfill is scheduled to reach capacity in 2018. On July 12, 2005, CWMI filed an application for a conditional use permit (CUP) for a project to increase KHF's capacity by vertically and laterally expanding the existing B-18 landfill and constructing and operating a new class I/II hazardous waste disposal landfill, to be known as the B-20 landfill (the project). The project would enlarge the permitted landfill operations area within the existing KHF site by 221.5 acres, bringing the total operations area to 695.5 acres. The B-20 landfill would begin operating as the B-18 landfill reached its design capacity; the two landfills might operate concurrently for a limited period of time. The B-20 landfill is anticipated to reach its potential permitted capacity in 2042. Types of hazardous waste that are currently prohibited would continue to be prohibited. The project did not require a zoning variance, rezoning or general plan amendment.

In 2004, the Kings County Community Development Agency (Agency) prepared and circulated a notice of preparation (NOP) of a draft subsequent environmental impact report (DSEIR) and initial study. A notice of project modification, revised NOP and

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[4] "California classifies wastes based on an assessment of the potential risk of water quality degradation associated with each category of waste (See e.g., California Code of Regulations [CCR], Title 23 [Class I landfills], CCR Title 27 [Class II landfills]). This classification system provides the basis for determining the containment strategy for each Class of waste to preclude it from posing a threat to the environment, and includes considerations of public health and safety."

initial study were prepared and circulated the following year. The DSEIR was released in March 2008 and circulated for a 45-day public review and comment period. The project description was revised in May 2008 and recirculated. In response to comments received by the Agency, portions of the DSEIR were revised in May 2009 to provide new information concerning the potential impacts of the project on traffic and water supply and circulated for public review and comment. The Agency held public meetings in 2008 and 2009 to receive comments on the DSEIR and recirculated portions of the DSEIR.

The final subsequent environmental impact report (FSEIR) was compiled and notice of availability was published on September 18, 2009.[5] The FSEIR identified the following significant adverse environmental effects which can be mitigated below significance: "cumulative health related impacts from [KHF operation] emissions at a distance of 2,000 feet or more from the KHF property boundary; direct and indirect effects to San Joaquin kit fox, blunt nosed leopard lizard, loggerhead shrike, and the American badger; and cultural and archaeological resources." The FSEIR identified the following significant and unavoidable adverse environmental effects: "cumulative periodic air quality emissions (PM10, 2.5, ROG/NOx); cumulative air quality emissions from long-term operations (PM10, 2.5, ROG/NOx); cumulative greenhouse gas

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5 The FSEIR consists of "the revisions, clarifications and corrections of the [DSEIR], the Revised Project Description and Analysis to the [DSEIR], and the Recirculated Portions of the [DSEIR]; the comments and recommendations received on the [DSEIR], the Revised Project Description and Analysis to the [DSEIR], and the Recirculated Portions of the [DSEIR]; a list of persons, organizations, and public agencies commenting on the [DSEIR], the Revised Project Description and Analysis to the [DSEIR], and the Recirculated Portions of the [DSEIR]; the responses of the Community Development Agency to significant environmental points raised in the review and consultation process; other information added by the Community Development Agency. The [FSEIR] also consists of the Revised Project Description and Analysis to the [DSEIR], and the Recirculated Portions of the [DSEIR], including the technical appendices included therein."

emissions; cumulative traffic impacts due, mainly, to the County's inability to control improvements within the jurisdiction of Caltrans; and cumulative additional lifetime cancer risk, under a hypothetical worst case scenario, at the KHF property boundary."

The Kings County Planning Commission (Planning Commission) conducted a public hearing on the FSEIR, after which it voted on October 19, 2009, to adopt resolutions certifying the FSEIR and approving CUP 05-10 for the project.

Appellants participated in the CEQA process prior to approval of the project and they appealed the Planning Commission's decision to the Board of Supervisors. After conducting a public hearing, the Board of Supervisors voted on December 22, 2009, to adopt resolutions upholding the decision of the Planning Commission, and adopting resolutions approving CUP 05-10 and certifying the FSEIR together with findings of fact, a statement of overriding consideration and a mitigation monitoring plan (Resolution Nos. 09-12 and 09-13).

II. Tanner Act Proceedings.

Separate and apart from the CEQA process, the project was subject to the requirements of the Tanner Act (codified at Health & Saf. Code, § 25199 et seq.), which requires counties to prepare hazardous waste management plans as part of the conditional use permit process. On September 13, 2005, the Board of Supervisors approved formation of a local assessment committee (LAC) for the project. The LAC conducted 25 public meetings to solicit community input concerning measures to protect public health and safety and to identify benefits and remuneration CWMI could provide to the County as compensation for the local costs associated with KHF operations. On March 19, 2009, the LAC and CWMI reached a negotiated agreement concerning the terms and conditions under which the project may be acceptable to the community. In relevant part, CWMI agreed to provide $100,000 to fund a community health survey of KC residents. On April 21, 2009, the Board of Supervisors received the LAC's final report and recommendation (final report), which incorporated the negotiated agreement.

The Board of Supervisors accepted the recommendations of the LAC and the final report was incorporated as an exhibit to the resolution approving the CUP.

III. Superior Court Proceedings.

Appellants filed their initial pleading naming the Board of Supervisors as the sole defendant on January 21, 2010. On February 19, 2010, they filed a verified first amended petition for writ of mandate and complaint for declaratory and injunctive relief alleging eight causes of action (first petition). Causes of action one through four alleged violations of CEQA and causes of action five through eight alleged violations of Government Code[6] sections 11135 and 12955.

CWMI demurred to the fifth through eighth causes of action. After hearing, the demurrer was sustained as to the three causes of action pled under section 11135 without leave to amend (fifth, sixth and seventh causes of action) and sustained as to the cause of action pled under section 12955 with leave to amend (eighth cause of action).

Appellants filed a second amended pleading (second petition) on July 22, 2010, that realleged the four CEQA causes of action (first through fourth causes of action), amended the cause of action pled under section 12955 (fifth cause of action) and alleged two new causes of action alleging violation of section 65008 (sixth and seventh causes of action).

CWMI filed a demurrer and motion to strike the fifth through seventh causes of action; the Board of Supervisors joined in this motion. After hearing, the court sustained the demurrer without leave to amend.

Hearing on the CEQA causes of action was held on November 22, 2010, after which the matter was taken under submission. A written order denying the petition for writ of mandate was filed on January 3, 2011, and judgment was entered in favor of the

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6 All further statutory references are to the Government Code unless otherwise indicated.

Board of Supervisors and CWMI on January 25, 2011. Appellants filed a timely notice of appeal on March 16, 2011, challenging the orders sustaining the demurrers to the civil rights causes of actions contained in the first and second amended petitions and the judgment denying the petition for writ of mandate.

DISCUSSION

APPELLANTS' CLAIMS OF CEQA NONCOMPLIANCE ARE NOT PERSUASIVE

Appellants argue the FSEIR is deficient in three respects. They contend health-related impacts were not adequately analyzed, the daily truck traffic baseline was inflated and the cumulative impacts analysis did not list and analyze all operations at KHF as related projects. In a thorough and carefully reasoned decision, the trial court decided all of these issues in the Board of Supervisors' favor. It rejected appellants' challenge to the adequacy of the FSEIR's study of health impacts for several reasons: (1) appellants did not set forth the evidence favorable to the Board of Supervisors; (2) comments concerning a health survey Greenaction conducted did not contain significant new information; (3) the FSEIR contains adequate analysis and study of health impacts; and (4) CWCI's agreement to fund a health survey was adopted pursuant to the Tanner Act and was not a substitute for full analysis during the CEQA process of the potential health impacts of the project. The trial court determined, inter alia, that administrative remedies were not exhausted on the truck traffic baseline and the cumulative impacts claims. After conducting the requisite independent review of the administrative record we reach the same conclusions. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 80 ["In reviewing compliance with CEQA, we review the agency's action, not the trial court's decision"].)

I. General CEQA Principles.

A. Standing and exhaustion of administrative remedies.

Only a proper party can bring a CEQA action. To have standing to maintain a legal proceeding alleging violation of CEQA, the petitioner must have "objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the filing of the notice of determination …." (Pub. Resources Code, § 21177, subd. (b).)

There exists a second hurdle petitioners must surmount before a claimed defect in CEQA compliance can be considered by the courts. With certain exceptions not shown to be relevant here, a petitioner who possesses standing to sue may allege as grounds of CEQA noncompliance only those objections to the proposed project that "were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Resources Code, § 21177, subd. (a); *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909 (*Porterville*).) This limitation is known as exhaustion of administrative remedies. Exhaustion is not a matter of judicial discretion; it is a mandatory statutory prerequisite that must be satisfied before an alleged violation of CEQA can be considered in a legal proceeding. (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 589 (*Tahoe*); see also *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199 (*BCLC*).)

"The exhaustion doctrine … operates as a defense to litigation commenced by persons who have been aggrieved by action taken in an administrative proceeding which has in fact occurred but who have failed to 'exhaust' the remedy available to them in the course of the proceeding itself." (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 340-341.) It ensures the public agency has an "opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are

subjected to judicial review." (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) Our Supreme Court has explained why the exhaustion doctrine is viewed with favor:

> "'There are several reasons for the exhaustion of remedies doctrine. "The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief." [Citation.] Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor "because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]' [Citation.]" (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501.)

To satisfy the exhaustion of administrative remedies requirement, the petitioner bears the burden of affirmatively proving that each alleged ground of CEQA noncompliance was presented to the agency "prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Resources Code, § 21177, subd. (a); *Porterville, supra*, 157 Cal.App.4th at p. 909; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.) While the petitioner "need not have *personally* raised the issue [citation], the exact issue raised in the lawsuit must have been presented to the administrative agency so that it will have an opportunity to act and render the litigation unnecessary." (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894.) "'[O]bjections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them. Otherwise, the purpose of the exhaustion doctrine would not be served, since the courts would be called upon to step outside their limited role of reviewing the decisionmaking process of the administrative agency ….' [Citation.]" (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 282 (*Banker's*

Hill).) "'General objections to project approval or general references to environmental issues are not sufficient.' [Citations.]" (*Porterville, supra*, 157 Cal.App.4th at p. 910.)

"An appellate court employs a de novo standard of review when determining whether the exhaustion of administrative remedies doctrine applies." (*Sierra Club v. City of Orange, supra*, 163 Cal.App.4th at p. 536; *Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873.)

B. Standard of review applicable to claims of CEQA noncompliance.

Once it has been determined that the petitioner possesses standing to bring a CEQA action and that administrative remedies were exhausted on the issue, the court must then decide the applicable standard of review. Our role in a CEQA proceeding, as in other mandamus cases, is the same as the trial court's role: "The appellate court review's the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo. [Citations.] We therefore resolve the substantive CEQA issues … by independently determining whether the administrative record demonstrates any legal error by the County and whether it contains substantial evidence to support the County's factual determinations." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 (*Vineyard*).)

In reviewing an agency's decision under CEQA, the court must decide if the agency prejudicially abused its discretion. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination is not supported by substantial evidence." (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 (*Dry Creek*); Pub. Resources Code, § 21168.5) "A court's proper role in reviewing a challenged EIR is not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document. [Citation.]" (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 (*Irritated Residents*).)

> "Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' [citation], we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.' [Citation.]" (*Vineyard, supra,* 40 Cal.4th at p. 435.)

"CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. ([CEQA] Guidelines, § 15151.)" (*Dry Creek, supra,* 70 Cal.App.4th at p. 26.) "[T]he reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure." (*Irritated Residents, supra*, 107 Cal.App.4th at p. 1390.) An EIR must contain facts and analysis, not just the bare conclusions of the agency. The adequacy of an analysis of environmental effects will be judged in light of what was reasonably feasible. (*Ibid.)* There must be "a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences." (CEQA Guidelines, § 15151.)

"When the specific claim of legal error concerns an omission of required information from the EIR, the plaintiff must demonstrate that (1) the EIR did not contain information required by law and (2) the omission precluded informed decisionmaking by the lead agency or informed participation by the public. [Citation.] These two elements constitute an abuse of discretion and prejudice, respectively, and together form reversible error." (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 76-77.) There is no presumption that an omission is prejudicial. (Pub. Resources Code, § 21005, subd. (b); *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748 (*Boat Shop*).) "Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of

relevant information has precluded informed decisionmaking and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements." (*BCLC, supra,* 124 Cal.App.4th at p. 1198.)

Conclusions, determinations and factual findings must be supported by substantial evidence in the administrative record. (*BCLC, supra,* 124 Cal.App.4th at p. 1198.) The substantial evidence standard "also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*Ibid*.) Substantial evidence is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, § 15384, subd. (a).) "Disagreement among experts does not constitute grounds for overturning an EIR." (*Cadiz, supra,* 83 Cal.App.4th 74, 97.) The petitioner bears the burden of proving that there is not sufficient evidence in the record to justify the respondent's action. (*Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 112-113 (*Alameda*).)

II. Challenges to the Adequacy of the FSEIR's Analysis of Health-Related Impacts are Meritless.

A. Facts.

i. DSEIR, Comments & Responses.

To assess whether the project could create carcinogenic, chronic or acute health hazards the Agency conducted a multi-pathway health risk assessment (the HRA) and analyzed ambient air samples. The HRA used a California Environmental Protection Agency (CALEPA) software program titled the "Hotspots Analysis and Report Program" (HARP), "which was developed by CALEPA's Office of Environmental Health Hazard Assessment to ensure consistency in the statewide risk assessment process." The San

Joaquin Valley Air Pollution Control District (Valley Air District) recommends use of HARP because it "allows for the inclusion of multiple exposure pathways such as dermal exposure, home-grown produce, soil ingestion, and mother's milk, rather than just inhalation." "HARP includes a dispersion modeling module and a risk calculation module to create a comprehensive risk calculation tool." To ensure that chronic and acute risks were not underestimated, each pollutant source was included in the HARP risk analysis at its maximum emission rate based on the worst-case emission scenarios for construction and waste-placement. Other "health-protective assumptions" were made in the HARP risk analysis. For example, it was assumed that a hypothetical resident would live at the property boundary for 24 hours per day/350 days per year for 70 years, even though there is no residential land use within 3 miles of KHF. The HRA results found "[a]ll of the risk assessment results at the nearest residential location and in [KC] were at least 30 times lower than the CALEPA and [Valley Air District] targets." "[A]cute and chronic risks are well below the acceptable levels at all receptors including at the [KHF boundary]. The 70 year cancer risk is greater than the 10 in a million threshold at some receptors within the 2,000-foot development buffer. However, the cumulative cancer risks are less than the allowable threshold at all receptors, including the nearest resident and sensitive receptor, beyond the 2,000-foot development buffer." "The risks that were calculated in nearby residential areas would not be of concern to public health because they were much lower than the [Valley Air District] target risk level." The HRA was peer reviewed by CPF Associates, Inc. and Golder Associates, Inc. They are independent scientific and engineering consulting firms who possess "expertise in performing health evaluations for a variety of waste management technologies, including landfills."

The ambient air analysis is a separate investigative tool that allows "for the calculation of health risks from existing operations at the location of the downwind monitors." The ambient air analysis was conducted in conjunction with the California Department of Toxic Substances Control (DTSC). Three ambient monitors were placed

at locations near the KHF boundary to sample concentrations of toxic air contaminants in the ambient air "in accordance with a workplan developed in conjunction with DTSC and the California Air Resources Board." This allowed for the calculation of health risks from existing operations. The results of the ambient air monitoring found that "the cancer health risk based on actual ambient air monitoring is significantly less than the modeled cancer health risk in the [HRA]." "When compared to the health risk predicted using emission estimates and modeled concentrations, this can serve as quality assurance that the HARP risk calculations are conservative estimates of risk.… [¶]… The cancer risk calculated during HARP is significantly higher than that calculated from the monitored concentrations. This indicates that the HARP model is giving conservatively high results."

Based on the results of the HRA and the ambient air analysis, the DSEIR concluded that the project would result in a less than significant health risk for "cancer and noncancer" at the KHF boundary and at a distance of 2,000 feet from the KHF boundary.

Appellants and Center for Race, Poverty and the Environment (CRPE) and Kids Protecting Our Planet (Kids) submitted a joint letter opposing CUP Permit No. 05-10. In relevant part, they commented that "[o]ne of the key flaws" in the DSEIR's health impacts assessment was that "no health survey has ever been conducted in [KC] despite strong anecdotal evidence of increased health problems among residents in the last few years." CRPE also submitted a separate comment letter on the DSEIR on behalf of itself and appellants. In relevant part, it stated that County did not have "sufficient information to judge potential cumulative health impacts from expanding the facility" because it "failed to conduct any research to determine whether or not residents have already experienced health effects from living near [KHF]." County should have conducted a health survey, asked nearby residents to be tested for chemical exposures or talked to them "about health concerns or possible disproportionate health impacts."

The responses stated that anecdotal evidence is not a reliable basis for determining if KHF operations cause health problems in KC residents, as follows:

> "… The commenter claims that such a survey should have been conducted based on anecdotal evidence of increased health problems among residents. Anecdotal evidence, however, is not a reliable basis for concluding the cause of the residents' health problems is the KHF operations. Anecdotal evidence is evidence obtained informally from isolated observations rather than from systematic investigation, is seldom collected with sufficient care or reported in sufficient detail to be trusted as a basis for generalization. Such evidence can be appropriately used to justify empirically verifiable claims; however, anecdotal evidence is not reliable for backing sweeping claims about a wide class of things, like people's health, which are the sort of claims usually examined by science. This is especially true for the health issues claimed by residents of [KC] who reside in an agricultural community located next to two highways. Either of those two factors have the potential to cause to contribute to negative health effects exhibited by residents."

The responses also stated that based on the results of the HRA, "no further study is warranted" regardless of anecdotal reports of health problems in KC residents. In addition, "neither CEQA nor CEQA case law requires an agency to conduct a door to door health survey in connection with analyzing air quality impacts of a proposed project." Also, the HRA results "showed that the health risks from the proposed [p]roject and from the combination of the proposed [p]roject and the onsite cumulative projects are less than the lifetime cancer health risk threshold criteria of 10 in one million." Because the scientific analyses conducted as part of the DSEIR showed that the project, individually and in conjunction with existing KHF operations, will not result in "a significant impact to the [KC] community, the County lacks a nexus to require the applicant to prepare additional health surveys or tests" of all KC and Avenal residents.

The commenters were referred to appendix C of the FSEIR because it "addresses most, if not all, of the concerns" regarding the project's health risks. Appendix C is the "DRAFT Refined Environmental Justice Assessment In support of the US EPA Region 9 PCB Permit Decision for … [KHF] (February 2007)" (EJA). The EJA was prepared by

the United States Environmental Protection Agency Region 9 (EPA) as part of its review of CWMI's application to continue to store and dispose of polychlorinated biphenyls (PCBs) at the KHF. The EJA "studied 30 environmental, community health, economic and social indicators in [KC] and Avenal" in order to evaluate "the environmental, health, economic and social issues in a community, with a focus on the impacts [KHF] will have on the local community." The EJA considered 19 different environmental indicators including air toxics, air quality and drinking water quality. It found that the KHF did not cause a potentially adverse impact in any of these areas. The EJA "found no case where KHF causes a potential adverse impact to the community. Thus, based on the indicators analyzed in this Draft EJ Assessment, US EPA has not found evidence that the communities of [KC] and Avenal experience adverse impacts from KHF."

The section of the EJA entitled "Community Health" explains that "information on access to health care, vital statistics, cancer, asthma, low birth weight, elevated blood lead levels and birth defects for the communities of [KC] and Avenal" was obtained. KC and Avenal have populations that are largely Hispanic and poor and both communities are designated as medically underserved areas.[7] "[T]he poor have worse health than other population groups, based on indicators including the following: shorter life expectancy; higher cancer rates; more birth defects; greater infant mortality; and higher incidence of asthma, diabetes, and cardiovascular disease. The ways in which poverty creates these health disparities is not well understood. Some racial groups can have a

[7] "Individuals below the poverty level constitute 43.7% of the population of [KC] and 30.7% of the population of … Avenal. Both of these percentages exceed the percentages for Kings County and California." Also, "94.6% of the population of [KC] is minority and 80.1% of the population of Avenal is minority." Individuals "of Hispanic ethnicity account for 92.7% of the population of [KC], and 65.9% of Avenal. Both of these percentages are well above the percentages for Kings County and the State of California for Hispanic populations. Avenal also has 12.6% African American population."

higher incidence of some heath problems, such as asthma." The EJA found that it could not develop a conclusion about whether these health impacts are disproportionately high because the small size of these communities makes detecting statistically significant increases or decreases in disease rates difficult and for many data sources, only county level data is available.

With respect to birth defects, the EJA found that KC and Avenal are "too small to be able to see a statistically significant difference between observed cases and expected cases." A cluster investigation would not be able to detect an association between a mild teratogen and the occurrence of a birth defect unless it evaluated hundreds or even thousands of pregnancies.

The EJA discussed an investigation conducted by the California Birth Defects Monitoring Program (CBDMP) concerning a spike in neural tube defects among infants born during 1992-1993 in the Buttonwillow community (the Buttonwillow Study).[8] The Buttonwillow Study concluded that "[t]here was no evidence linking the cases to hazardous waste site or to the trucking of hazardous waste to the site. Overall birth defects data from 1987 to 1991 suggest no long term birth defects problems in Buttonwillow."

ii. Comments on Greenaction's Health Survey and Responses.

On July 8, 2009, the Fresno Bee newspaper published an article reporting that Bradley Angel, who is the executive director of Greenaction, said that his group conducted a health survey of an unspecified number of KC residents (Greenaction's health survey). Angel said the results showed a number of infants had been born with birth defects.

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[8] The other hazardous waste disposal facility in California is located near Buttonwillow.

A few days later, appellants, CRPE and Kids jointly submitted a comment letter on recirculated portions of the DSEIR. This letter stated information requiring investigation had been discovered in the responses to Greenaction's health survey: "It has now been confirmed that at least four, and apparently five, infants were born in [KC] between September 2007 and November 2008 with birth defects. At least four of the infants were born with cleft palate, and at least one also was born with brain defects. Three of these five infants passed away during their infancy." The letter asserted this is "significant new information that must be evaluated in a DSEIR and its reality [*sic*] health and environmental impact analysis."

On August 5, 2009, County mailed Greenaction a letter which stated that to "provide a complete and meaningful response to your concerns, it needs to consider all available information concerning the birth defects to which you refer." Therefore, it asked Greenaction for copies of the health survey forms it collected. In response, Greenaction gave County a blank copy of the health survey form. It did not give County any completed survey forms or provide County with a compilation of redacted survey responses. Greenaction did not provide any information concerning survey methodology, the number of survey participants or their ages, genders or occupations. Greenaction gave the names and vital statistics of four infants it wrote were born with cleft palates "and at least two had brain defects and two had heart problems." Greenaction wrote that the parents of these infants had testified at a "Listening Session" held on August 12, 2009, and that the parents reported to it that they did not use illegal drugs, drink "a lot of alcohol," and that the mothers did not perform fieldwork during their pregnancies. Greenaction also wrote that "[r]esidents estimate that approximately twenty infants were born in this time period."

County contacted the Kings County Health Department and ascertained that it had not been provided with any information derived from Greenaction's health survey.

On October 5, 2009, appellants and Kids submitted a joint comment letter on the recirculated portions of the DSEIR. In relevant part, the letter asserts that "Kings County officials are actively involved in a cover-up of the birth defect and infant mortality cluster."[9] CRPE submitted a separate comment letter that repeated the same information about birth defects among KC infants. Studies and literature concerning birth defects, landfills and chemical exposure were submitted.

The response to these comment letters states that Greenaction's health survey did not reveal significant new information because Greenaction expressed similar concerns about health conditions in KC residents in its comment letter on the DSEIR. Information contained in the responses to Greenaction's health survey did not reveal a new significant adverse impact caused by the project or an increase in the severity of a previously identified adverse impact because there is no evidence linking existing KHF operations or the project to the new birth defect and infant mortality information. The response then set forth evidence supporting the determination that the project will not result in any direct or indirect adverse impacts to human health, including pregnant mothers living in KC or other surrounding areas.

Citing several research studies (attached as appendices to the FSEIR), the response explained that "Cleft palate may be caused by genetic and environmental factors, although the exact relationships are not clearly understood." A baby may be at higher risk for being born with a cleft palate if the mother is a teenager or older than 35, is malnourished, does not have prenatal care, uses certain medications, takes illegal drugs, smokes or drinks while pregnant or is exposed to radiation, infection or pesticide. The response discussed a 2006 research study examining the association between oral clefts and mothers living in proximity to waste sites in Texas (the Texas Study). The Texas

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9 Appellants did not reiterate this accusation on appeal.

Study found that women who lived within one mile of a waste site were not more likely to have offspring with oral clefts, when compared with women who lived farther away. Then the response explained that the Buttonwillow Study found no evidence linking the birth defects to the hazardous waste disposal facility.

The response also explained that the small size of KC and Avenal communities makes detecting statistically significant increases or decreases in birth defects difficult. During preparation of the EJA, the director of the CBDMP "expressed their concern that the number of births in [KC] are so small that it is difficult to conduct an effective study of birth defects." Further, the HRA and ambient monitoring data indicates that emissions from the proposed project are lower than the CALEPA and Valley Air criteria at 2,000 feet from the KHF boundary. California Birth Defects Registry states approximately 3 percent of babies in California will be born with a birth defect. Yet, out of a total of 337 births in KC between 1998 and 2005 only one infant with a birth defect was reported and the birth defect rate in KC of 2.97 per 1,000 births is one of the lowest in the County. The response concluded that because the analysis in the FSEIR is supported by substantial evidence, CEQA does not require the County to conduct further studies.

A staff report prepared for the October 19, 2009, meeting of the Planning Commission analyzed the literature and studies concerning birth defects that were submitted by commenters. The staff report concluded that "the additional materials submitted by CRPE are consistent with the findings and conclusions of the [DSEIR] that the available research does not show an elevated risk of oral cleft birth defects for women living 3.5 miles away from a regulated hazardous waste disposal site." One of the research studies analyzed over 1 million births to women living near a Superfund site (the Superfund Study). The Superfund Study concluded that women who lived within one-quarter of a mile of a Superfund site during the first three months of pregnancy had an elevated risk of having children with heart and neural tube defects but cleft lip and cleft palates did not occur any more frequently than expected. The Superfund Study

determined that women who lived farther than one-quarter mile from the site were not at elevated risk of any birth defects. The staff report stated that the "other materials submitted by CRPE include reports of studies which attempt to establish a link between environmental conditions in general and birth defects like cleft lips and cleft palates. However, these studies acknowledge that their results are contradictory."

iii. Testimony and additional materials before the Board of Supervisors.

Additional research studies and publications concerning birth defects and hazardous waste disposal facilities were submitted to the Board of Supervisors. These included an April 1999 publication by the CBDMP titled "Investigating Birth Defects Clusters: A Systematic Approach," which emphasized that in order for a teratogen to cause structural defects "[t]here must be a verifiable route by which the pregnancy was exposed." A paper titled "Discussion of Epidemiological Literature Related to Reproductive Health and Landfills" summarized recent literature related to reproductive health and landfills. It concluded: "Overall the studies do not provide convincing evidence for an association between living near landfills and reproductive health effects. In general, available studies on the health effects of landfills indicate … a modern landfill [that is properly managed] … will not be of concern to public health, including the health of pregnant women and babies." (Italics omitted.) This paper also stated that single-site studies of a specific landfill "often have very limited statistical power due to low population in the landfill area; this means these types of studies generally do not provide insight into the potential for health effects. Unless a landfill site is located in a densely populated area, with a large population of residences within about 2-3 km from the facility, a single-site study is unlikely to be able to provide useful information about health effects potentially associated with a landfill."

Phillip Ross and Bill Brown testified at the hearing before the Board of Supervisors. Ross is a hydrogeologist who has worked on groundwater investigations at

KHF since 2002. He testified that the groundwater at the KHF site is isolated from regional groundwater supplies and will not impact drinking water sources for KC. The geologic and hydrogeological data for the KHF site has been collected over a 30 year period and conditions are well understood. Groundwater samples are collected from 40 wells and tested four times annually. Brown is a registered engineer and environmental air quality consultant who worked at KHF for the past 15 years. He testified that the ambient air monitoring program began in fall 2006 and preliminary results do not show any evidence of a significant health risk caused by KHF operations. Several female employees testified that they worked at KHF during their pregnancies and gave birth to healthy infants.

The CEQA findings of fact found that the project would not have significant adverse health-related impacts. Also, it found that "requests for additional studies went beyond the duty to consider the potentially significant adverse impacts of the project to the physical environment, County staff determined that additional analysis was not warranted under CEQA.… [¶] Moreover, where County staff determined that substantial evidence already exists to support the conclusions of the [FSEIR], staff chose not to undertake additional analysis."

B. The substantial evidence standard of review is applied to challenges concerning the scope of the FSEIR's analysis of health impacts and to challenges concerning findings that the project would not have adverse health impacts.

Appellants challenge the adequacy of the FSEIR's study of the project's potential to cause adverse health-related impacts. They argue that once County was notified of Greenaction's health survey, it was obligated to investigate and conduct a study to determine if existing KHF operations caused the reported birth defects and assess whether the project would "exacerbate" birth defects among the KC residents, even if "the defects were caused by other factors." Appellants also argue that information derived from Greenaction's health survey "reflects a different environmental setting than

that analyzed in the [FSEIR] and thus qualifies as significant new information requiring recirculation." In appellants' view, all of these claims should be reviewed under the less deferential standard of "failure to proceed as required by law." The Board of Supervisors disagrees, arguing that these points are, in actuality, a challenge to the sufficiency of the evidence supporting the factual finding that the project will not have any adverse health impacts.

Santa Monica Baykeeper v. City of Malibu (2011) 193 Cal.App.4th 1538 (*Baykeeper*) resolved this dispute in the Board of Supervisors' favor. In *Baykeeper*, the appellate court rejected the appellant's assertion "that de novo review is appropriate since City did not proceed as required by law because the EIR failed to adequately analyze impacts." (*Id*. at p. 1546.) It explained:

> "Baykeeper's argument regarding the standard of review is too simplistic. The court in *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986 … explained: 'An EIR will be found legally inadequate—and subject to independent review for procedural error—where it omits information that is both required by CEQA and necessary to informed discussion.' But CEQA challenges concerning the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology are factual determinations reviewed for substantial evidence. [Citations.] Put another way, '[w]e apply the substantial evidence test to conclusions, findings, and determinations, and to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions.' [Citation.]" (*Baykeeper, supra*, 193 Cal.App.4th at p. 1546.)

Appellants' arguments concerning the scope of the FSEIR's analysis of the project's potential to cause birth defects amount to an objection to the scope and methodology used to analyze health impacts, and a challenge to the adequacy of the evidence supporting the findings in the FSEIR and CEQA findings of fact that the project would not have significant adverse health impacts. These are fact-based challenges that

are reviewed under the substantial evidence test. (*Baykeeper, supra*, 193 Cal.App.4th at p. 1546.)

C. Appellants forfeited their challenge to the findings that the project would not have adverse health impacts by failing to lay out all the evidence and show why it is lacking.

The Board of Supervisors[10] argues that appellants forfeited challenge to the sufficiency of the evidence supporting the findings that the project would not have significant adverse health impacts by failing to set forth all the evidence supporting these findings and show why it is lacking. We agree.

It is a well-established principle that "an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266 (*Defend the Bay*).) "To prevail on an argument concerning the sufficiency of the evidence, a party must cite to the relevant evidence, not to arguments about the evidence." (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 935, fn. 8 (*Tracy*).) "The duty to adhere to appellate procedural rules grows with the complexity of the record." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290 (*Aggregates*).)

Alameda, supra, 149 Cal.App.4th 91 explained that the petitioner bears the burden of demonstrating that the record does not contain sufficient evidence justifying a contested project approval. "To do so, an appellant must set forth in its brief all the material evidence on the point, not merely its own evidence. [Citation.] A failure to do

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10 CWMI joined in the arguments advanced by the Board of Supervisors and vice-versa.

so is deemed a concession that the evidence supports the findings." (*Id.* at pp. 112-113.) The court reasoned, "'[I]f the appellants fail to present us with all the relevant evidence, then the appellants *cannot* carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence the appellants ignore.' [Citation.] This failure to present all relevant evidence on the point 'is fatal.' [Citation.] 'A reviewing court will not independently review the record to make up for appellant's failure to carry his burden.' [Citation.]" (*Id.* at p. 113.)

Most recently, in *Tracy*, *supra*, 177 Cal.App.4th 912, Tracy first argued that the City of Tracy (City) challenged the finding that a proposed project would not result in wasteful energy consumption. The court found that the point had been forfeited, reasoning:

> "Tracy First makes no attempt to set forth fully the facts relating to the City's decision to certify the EIR with respect to the energy analysis. Instead, Tracy First simply makes the bare assertion that the opinion of the City's expert that the project would not result in wasteful … consumption of energy was not supported by facts and there was no Appendix F analysis. Thus, Tracy First forfeited its contention that substantial evidence does not support the City's conclusion that the project's energy impacts would not be significant." (*Id.* at p. 935.)

Here, just as in *Alameda* and *Tracy*, appellants did not set forth the evidence supporting the finding in the FSEIR that the project would not have adverse health impacts and the additional evidence supporting this same finding in the CEQA findings of fact. Appellants did not discuss the two health risk studies contained in the DSEIR evaluating the carcinogenic, chronic and acute health risks associated with exposure to toxic air contaminants emitted by KHF operations. They did not reference the contents of the detailed responses to the comments about Greenaction's health survey, which are part of the FSEIR. They did not discuss the research studies referenced in the responses to comments on this topic. Appellants did not mention the testimony given by Bill Brown and Philip Ross at the hearing before the Board of Supervisors. They did not

disclose the fact that Greenaction failed to provide County with any completed responses to the health survey questionnaire or a complete summary of responses. Appellants' failure to set forth all the evidence is deemed to be a concession that there exists substantial evidence supporting the findings that the project will not have significant adverse health impacts. (See, e.g., *Alameda, supra,* 149 Cal.App.4th at pp. 112-113; *Tracy, supra,* 177 Cal.App.4th at pp. 934-935.)

D. County did not violate the information disclosure provisions of CEQA by rejecting the suggestion to study the health of KC residents.

Appellants argue that once County was informed that the responses to Greenaction's health survey indicated, inter alia, that in 2007 and 2008 five babies with birth defects (cleft palate/cleft lip and unspecified heart defects) were born to mothers residing in KC, County was obligated to study the health of KC residents to determine if existing KHF operations caused or contributed to these infants' birth defects.[11] Appellants further argue that the health of KC residents must be studied prior to certification of the FSEIR in order to adequately assess whether the project could exacerbate existing health conditions of KC residents, even if those conditions were not caused by KHF operations. Absent study of the health of KC residents, appellants contend the FSEIR "does not reflect a good faith effort at full disclosure as required by CEQA."

As we will explain, County reasonably exercised its discretion to reject the proposal for additional testing. The FSEIR reflects an adequate, good faith effort to

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11 Greenaction did not provide County with any completed health survey forms or a redacted compilation of survey responses. The record does not contain any other evidence proving that in 2007 and 2008 five women residing in KC gave birth to infants with birth defects. Yet, because the parties appear to have assumed that Greenaction's comments concerning the results of its survey were factually accurate, for purposes of this discussion only, we will do likewise.

analyze the project's potential impacts on public health, including birth defects. The responses to the comments on this topic adequately explain why the Agency rejected the suggestion to study the health of KC residents and this decision is supported by substantial evidence.

i. CEQA does not require all suggested tests to be conducted.

"CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors. When responding to comments, lead agencies need only respond to significant environmental issues and do not need to provide all information requested by reviewers, as long as a good faith effort at full disclosure is made in the EIR." (CEQA Guidelines, § 15204, subd. (a).) "The fact that additional studies might be helpful does not mean that they are required. [Citations.] The agency has discretion to reject a proposal for additional testing or experimentation." (*Irritated Residents, supra*, 107 Cal.App.4th at p. 1396; *Cadiz, supra*, 83 Cal.App.4th at p. 100.) "[A]n EIR need not include all information available on a subject." (*Boat Shop, supra,* 18 Cal.App.4th at p. 748; *Irritated Residents, supra*, 107 Cal.App.4th at p. 1397.)

The line of pertinent authority begins with *Society for California Archaeology v. County of Butte* (1977) 65 Cal.App.3d 832 (*Archaeology*). In *Archaeology*, the petitioner argued the agency failed to proceed as required by law when it declined suggested archeological testing. The appellate court disagreed. It explained: "In essence, this contention advocates a rule making it mandatory for an agency to conduct every test and perform all research, study and experimentation recommended to it to determine true and full environmental impact, before it can approve a proposed project. We reject this contention, first because it is unreasonable, and second because neither the statutes (Pub. Resources Code, § 21000 et seq.) nor the [CEQA Guidelines] … suggest it." (*Id*. at p. 838.) The court continued, "Such being the purpose of the EIR (environmental information only, with discretion reserved in the agency to accept or reject it), it is totally

inconsistent with the legislative objective to cease all further consideration of a project unless recommended testing is performed. Just as an agency has the discretion for good reason to approve a project which will admittedly have an adverse environmental impact, it has discretion to reject a proposal for additional testing or experimentation." (*Id*. at pp. 838-839.)

Following and applying *Archeology*, in *Cadiz*, *supra*, 83 Cal.App.4th 74, the appellate court rejected the plaintiff's contention that an EIR prepared for a proposed project to build a hazardous waste landfill was inadequate because the agency did not conduct suggested trenching to determine whether there was an active fault within the vicinity of the project site. The court explained that three geologists determined the lineament was not fault-related and, even if it were, it was not large enough to produce a significant earthquake. (*Cardiz, supra,* at pp. 100-102.) The court found the existence of disagreement on the point did not constitute grounds for overturning the EIR. "[T]here is substantial evidence supporting the finding that lineament A was adequately investigated and discussed in the EIR, and the County's decision not to require additional trenching before certifying the EIR does not constitute an abuse of discretion." (*Id*. at p. 102.)

Most recently, in *Irritated Residents*, *supra,* 107 Cal.App.4th 1383, this court determined that refusal to conduct a suggested protocol level study to assess whether kit fox utilized the site selected for a proposed dairy did not violate the information disclosure requirements of CEQA. The EIR adequately explained the reasons why a protocol level study was not conducted and a biological report prepared as part of the DSEIR constituted substantial evidence supporting the determination that, as mitigated, the dairy would not significantly affect the kit fox. (*Id.* at pp. 1396-1397.)

In support of their contention that County was required to study the health of KC residents, appellants rely on *BCLC, supra,* 124 Cal.App.4th 1184. Such reliance is misplaced. In *BCLC*, the lead agency refused to consider whether a proposed retail shopping center could cause urban decay on the ground that this involved an economic

effect of the project that was outside the scope of CEQA. Several topical research studies submitted by project opponents were ignored and a member of the Bakersfield City Council derisively referred to this literature as being "merely fit 'for recycling'." (*Id*. at p. 1210, fn. 6.) We held that when there is evidence in the administrative record suggesting that the economic and social effects of a project could result in physical deterioration, the lead agency is obligated to assess this indirect impact and "cannot divest itself of its analytical and informational obligations by summarily dismissing the possibility of urban decay or deterioration as a 'social or economic effect' of the project." (*Id*. at p. 1207.) *BCLC* has no relevance to the matter before us because County did not refuse to consider potential health effects of the project. In direct contrast to *BCLC*, studies were conducted as part of the DSEIR to assess the project's potential to cause health-related impacts (e.g., the HRA and ambient air analyses). Research studies considering the potential relationship between landfills and birth defects (e.g., the Texas Study, the Superfund Study, the Buttonwillow Study), as well as literature and data by the CBDMP and other sources, were examined. A detailed, substantive response to comments on this topic was crafted and included in the FSEIR. Thus, *BCLC* is factually and legally inapposite.

ii. Rejection of suggested study of KC residents' health was a reasonable exercise of discretion and this decision is supported by substantial evidence.

Having examined existing authority on this topic, we now apply the established legal principles to the facts before us. We first address appellants' contention that County was required to investigate the cause of the birth defects reported in Greenaction's health survey before approving the project. Appellants err by failing to distinguish between preexisting environmental problems in KC and adverse environmental effects of the proposed project. Where existing environmental problems are not exacerbated by a project, an EIR is not required to analyze those existing

problems or suggest ways to improve them. (*In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1167.) For example, in *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, the appellants challenged the FEIR prepared for a city's general plan because it failed to pinpoint a solution to an existing overdraft problem. The appellate court rejected this contention, explaining: "[T]he overdraft problem will remain but will not be exacerbated by the proposed project. The FEIR was not required to resolve the overdraft problem, a feat that was far beyond its scope." (*Id*. at p. 1094.) Likewise, in this case it is beyond the scope of the FSEIR for the proposed project to require investigation into the cause of existing birth defects. Such birth defects could not possibly have been caused by the proposed project. Further, there is no evidence indicating that the proposed project will exacerbate any existing health problems among KC residents.

In any event, the ambient air analysis studied current KHF emissions. It allowed for calculation of health risks from existing operations. Also, the EJA found KHF operations did not cause KC residents to suffer any adverse effects due to, inter alia, air toxics, air quality or drinking water quality. And existing research studies did not find that regulated hazardous waste landfills caused an increase in birth defects within populations living more than a mile away from the facilities (e.g., Superfund Study, Texas Study, Buttonwillow Study). The ambient air analysis, EJA and existing research studies are sufficient to satisfy any CEQA-based inquiry obligation concerning the possibility that the birth defects reported in responses to Greenaction's health survey were caused, in whole or in part, by KHF operations.

We now turn to the question whether the FSEIR is inadequate because it did not study the health of KC residents to determine if the project could exacerbate existing health conditions or cause birth defects. As we will explain, the studies that were conducted as part of the DSEIR (i.e., the HRA and ambient air study), the EJA, and the research studies discussed in the responses to comments (the Superfund Study, the Texas

Study and the Buttonwillow Study) contain sufficient analysis of the question whether the project could exacerbate health conditions or increase birth defects and support a finding that the project will not provide a pathway for a teratogenic substance to come in contact with residents of KC, including pregnant women. Existing research studies also show that site specific studies of hazardous landfills are of little benefit and the studies that have been conducted did not find an increase in birth defects among women living more than half a mile away from a landfill. This evidence adequately supports the decision not to conduct the suggested KC health study.

The literature and studies on the topic of environmentally caused birth defects agree that determining if a birth defect is caused by exposure to a single environmental factor is extraordinarily complex. The CBDMP explains that in most situations, the "environment imposes an avalanche of possible stimuli" and those factors may interact to produce different results. The EPA concluded that it may be impossible to discover an association between a mild teratogen and a cluster of birth defects occurring in a small community. "A cluster investigation cannot detect a teratogen causing a lesser increase. Only large epidemiologic studies evaluating hundreds or even thousands of pregnancies are likely to detect these mild teratogens."

In order for a birth defect to have an environmental cause, a pregnant mother needs to have been exposed to a teratogenic substance. Data derived from the HRA and ambient air studies that were conducted as part of the DSEIR can be used to determine if the project could create a pathway for a teratogenic substance to come into contact with pregnant women. "The HARP results indicate that the inhalation exposure pathway accounts for nearly all of the health risk." The results of the HARP and ambient air studies showed that the quantity of pollutants crossing the KHF site boundary will be substantially less than that permitted by Valley Air District and CALEPA. Pollutants will be further dispersed as they travel further from the KHF site. As explained by the CBDMP, "airborne contamination diffuses quite rapidly as it travels from its source;

groundwater contamination may never reach drinking water supplies." "Prevailing winds are not from KHF towards [KC]." Groundwater at KHF is isolated from regional groundwater supplies and will not impact drinking water sources for KC.

The results of the HRA and ambient air analysis are further supported by the EJA, which "studied 30 environmental, community health, economic and social indicators in [KC] and Avenal" in order to evaluate "the environmental, health, economic and social issues in a community, with a focus on the impacts [KHF] … will have on the local community." The EJA found that the KHF did not cause a potentially adverse impact in any of 19 different environmental indicators, including air toxics, air quality, and drinking water quality. It also concluded that KC is too small to support a scientifically reliable study analyzing whether KHF operations affected KC residents' health. Also, data from the California Birth Defects Registry shows that the birth defect rates for KC is one of the lowest in Kings County and is lower than the state average.

Existing research studies further support the conclusion that it is not necessary to study the current health of KC residents in order to properly analyze the project's potential to cause adverse health impacts. The Buttonwillow Study is highly relevant. The Buttonwillow Study analyzed a birth defect cluster that occurred in a small community in California located near a landfill. The Buttonwillow Study did not find that the landfill contributed to a spike in birth defects. Large scale epidemiological research studies that have been conducted (e.g., the Texas Study and the Superfund Study) also did not find a correlation between hazardous waste facilities and elevated birth defect rates in communities more than a mile away from the landfill.

Based on this evidence, we hold that the FSEIR adequately analyzed whether the project could create a pathway by which a person living in KC could come into contact with a teratogenic substance contained in or derived from materials disposed of at KHF. It sufficiently analyzed the project's potential adverse health impacts, including the possibility that the project could elevate birth defect rates in KC. Evidence discussed in

the FSEIR adequately supports the conclusion that studying the health of KC residents as requested by commenters would not have produced meaningful information pertinent to the question whether the project emissions could increase birth defects in KC or exacerbate other existing health conditions. The Agency was not required to conduct every imaginable test in a futile effort to convince appellants to accept the factual conclusions reached in the FSEIR. The decision not to study the health of KC residents was a reasonable exercise of discretion and did not violate the informational disclosure provisions of CEQA. (*Cadiz, supra,* 83 Cal.App.4th at p. 102; *Irritated Residents*, *supra*, 107 Cal.App.4th at pp. 1396-1397.)

Our holding that the FSEIR adequately studied the project's potential adverse health impacts necessarily dooms appellants' related claim that County impermissibly delayed the study of KC residents' health. CWMI agreed to fund a community health study as part of proceedings under the Tanner Act. This separate agreement does not have any bearing on the adequacy of the FSEIR or compliance with the requirements of CEQA.

E. Recirculation was not required.

Appellants argue that the information provided by Greenaction concerning some of the responses to its health survey "reflects a different environmental setting than that analyzed in the [FSEIR] and thus qualifies as significant new information requiring recirculation." The Board of Supervisors replies that this information is not a change in the environmental setting. We agree with the Board of Supervisors.

CEQA Guidelines section 15088.5 provides that an EIR must be revised and recirculated when "significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification." (CEQA Guidelines, § 15088.5, subd. (a); see also Pub. Resources Code, § 21092.1.) "[T]he term 'information' can include changes in the project or environmental setting as well as additional data or other information." (CEQA

Guidelines, § 15088.5, subd. (a).) Also, "New information added to an EIR is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect … that the project's proponents have declined to implement." (*Ibid*.) "Recirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR." (CEQA Guidelines, § 15088.5, subd. (b).) "A decision not to recirculate an EIR must be supported by substantial evidence in the administrative record." (CEQA Guidelines, § 15088.5, subd. (e).)

"CEQA defines 'environment' as 'the physical conditions which exist within the area which will be *affected by a proposed project*, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.' (§ 21060.5, italics added.)" (*South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1614, quoting Pub. Resources Code, § 21060.5; see also CEQA Guidelines, § 15360.) The term "environmental setting" means "a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published." (CEQA Guidelines, § 15125, subd. (a).) The "environment setting" of a project are the surrounding physical conditions such as topography, air quality, plant life and water resources. The health of individual people is not part of a project's environmental setting. Thus, information that five infants in the KC community were born with birth defects does not constitute a change in the project's environmental setting.

Comments about Greenaction's health survey do not contain "significant new information" within the meaning of CEQA Guidelines section 15088.5. Comments describing some of the results of Greenaction's health survey merely amplify comments previously submitted on the DSEIR stating that residents of KC have a high incidence of health problems. Information about five KC infants with birth defects does not directly

contradict anything in the DSEIR because there is nothing indicating that the birth defects were caused, in whole or in part, by KHF operations. The FSEIR contains substantial evidence supporting its conclusion that the project would not provide a verifiable pathway for scientifically significant quantities of pollutants to travel to KC and would not have adverse health impacts. This finding was strengthened by the testimony of Ross, an expert hydrogeologist, and Brown, an environmental engineer.[12] Thus, we hold the decision not to recirculate the DSEIR is supported by substantial evidence and reject appellants' claim of error.

III. Appellants Forfeited Their Challenges to the Truck Traffic Baseline and Cumulative Impacts Analyses By Failing in Their Opening Brief to Either Affirmatively Show Administrative Remedies Had Been Exhausted Or Challenge the Trial Court's Ruling on the Exhaustion Issue.

CWMI argues appellants should be deemed to have forfeited the truck traffic baseline and cumulative impacts claims because they did not affirmatively prove exhaustion in their opening brief or challenge the trial court's decision that they did not exhaust administrative remedies. CWMI is correct.

It is a fundamental tenet of appellate review that the trial court's judgment is presumed correct and appellant has the burden of affirmatively demonstrating prejudicial error from the record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) It is outside the court's role to carry appellate counsel's

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12 We reject appellants' contention that testimony of Brown and Ross cannot be considered in determining whether the decision not to the recirculate the DSEIR is supported by substantial evidence. *Communities for a Better Environment v. City of Richmond, supra*, 184 Cal.App.4th 70, which is relied upon by appellants, is inapposite. That case did not involve recirculation of an EIR and expert testimony at a hearing on project approval was substituted in place of analysis in the EIR. The court found "[e]ven if this post-EIR information could somehow be used to cure the EIR's shortcomings," it was based on undisclosed data and so "does not meet the 'informational' goals of CEQA." (*Id*. at p. 88.) Here, testimony given by Brown and Ross merely bolstered the analysis and information contained in the DSEIR.

burden or act as counsel for either party to an appeal. (*In re S.C.* (2006) 138 Cal.App.4th 396, 407.)

> "… To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court' [Citations.]… [¶] In addition, appellant's brief 'must' '[s]tate each point under a separate heading or subheading summarizing the point ….' [Citations.] This is not a mere technical requirement; it is 'designed to lighten the labors of the appellate tribunals by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass.' [Citations.]" (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408.)

In addition, "The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) An appellant forfeits a contention by waiting until the reply brief to raise it. (*Ibid*.) Principles of fairness preclude consideration of arguments that are raised by appellants for the first time in a reply brief absent a showing of good cause. (See, e.g., *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 526, fn. 8.)

Examination of the briefing in this case shows that in their opening brief appellants did not challenge the trial court's finding that administrative remedies had not been exhausted on the truck traffic baseline and cumulative impacts claims. Also, appellants did not affirmatively show that they had exhausted administrative remedies on these points. Appellants ignored the exhaustion of administrative remedies requirement. Only after CWMI argued these points in its responsive brief did appellants assert, for the first time, in their reply brief that they had satisfied this statutory requirement.

Appellants did not offer any good cause for the omissions in their opening brief. Instead, appellants argued that the de novo standard of review that is applied to exhaustion determinations excuses them from any obligation to affirmatively argue exhaustion in their opening brief. We disagree. The applicable standard of review has no bearing on a party's obligations to affirmatively demonstrate prejudicial error and to present all claims of error in the opening brief with supporting legal analysis and citation to the record. (Cf. *Aggregates, supra*, 101 Cal.App.4th at pp. 290-291 [de novo standard of review does not excuse failure to summarize facts in briefing].)

Appellants were demonstrably aware of the obligation to either affirmatively prove exhaustion of administrative remedies or challenge the trial court's decision on this issue because appellants did so in connection with their challenge to the sustaining of the demurrer to the cause of action alleging violation of section 12955. In that section of their opening brief, appellants noted that the trial court found they failed to exhaust administrative remedies and that appellants construed this decision to be limited to claims arising from section 65008. Then appellants wrote that they did not appeal the decision "insofar as it disposes of claims under that section.… However, to ensure that there is no waiver of these arguments, Appellants address exhaustion as to the FEHA claims as well."[13] Appellants then affirmatively argued that they were not required to exhaust administrative remedies for the causes of action alleging violation of section 12955.

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13 Since appellants used the term "waiver," we mention that forfeiture, not waiver, is implicated here. Forfeiture and waiver are not interchangeable terms. "… Over the years, cases have used the word [waiver] loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right. '[T]he terms "waiver" and "forfeiture" have long been used interchangeably. The United States Supreme Court recently observed, however: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" [Citation.]' [Citation.]" (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371; *People v. Chaney* (2007) 148 Cal.App.4th 772, 777, fn. 2.)

It, therefore, follows that appellants forfeited judicial review of their objections to the FSEIR's truck traffic baseline and cumulative impacts analysis by failing in their opening brief to either affirmatively show that the same issue was presented to the Agency during the administrative proceedings or to expressly challenge the trial court's finding that administrative remedies had not been exhausted. In any event, as will be shown *post*, administrative remedies were not exhausted.

IV. Administrative Remedies Were Not Exhausted on the Truck Traffic Baseline Claim.

A. Facts.

The September 2005 NOP stated the project could result in 100 additional daily peak truck round-trips for the transport of waste to KHF. In an October 2005 comment letter on the NOP, the California Department of Transportation (Transportation Department) commented that a traffic impact study needed to be prepared to analyze the effects of additional truck trips.

The executive summary to the DSEIR explained that the statement in the NOP that the project could result in 100 daily peak truck round trips was a misstatement and the project would not increase truck traffic to KHF. A traffic impacts study was conducted as part of the DSEIR (appendix L to the DSEIR). The traffic impacts study assumed a continuation of the 400 truck-round trips per day hauling hazardous waste and 80 employee round-trips per day. Based on this traffic impacts study, the DSEIR concluded: "Existing waste transport traffic associated with all operations at KHF is 568 waste transport truck round-trips per day, Monday through Friday/Saturday (a maximum average of 400 round-trips for hazardous waste and a maximum of 168 truck round-trips to the B-19/B-17 Class II/Class III landfills."

In an April 2008 comment letter on the DSEIR the Transportation Department "recommended that the project trips need to be verified and the [traffic impact] study be revised if deemed necessary to reflect the correct number of employee and truck trips

generated by proposed project. If the truck trips continue to remain unchanged, then the traffic analysis should provide a detailed explanation of these results."

In response to this comment letter, the traffic impacts portion of the DSEIR was revised, an addendum to the traffic impact study was prepared and this portion of the DSEIR was recirculated. Appendix L-1 to the recirculated DSEIR was prepared by CWMI. It contains an explanation how the baseline of 400 round truck-trips per day was derived: "The 400 truck trips is a maximum peak average number of trips per day. This baseline number was derived from the waste manifest/receipt logs from 2001-2004, leading up to the issuance of the first notice of preparation for the [DSEIR] in September 2005." The revised DSEIR states: "when the September 2005 NOP was issued, the peak average number of daily hazardous waste truck round-trips hauling Class I hazardous waste and Class II designated waste to KHF for disposal at the B-18 Landfill was determined to be 400. Appendix L-1 provides a summary of days from January 2001 to December 2005 when KHF received greater than 380 manifests in any one day. One manifest usually represents on[e] truck trip. The summary table in Appendix L-1 shows certain days when KHF exceeded 380 manifests. The average of the manifests received on peak days was determined to represent 400 round truck-trips per day. This represents the baseline used in the SEIR (400 round truck-trips per day)." Appendix L-1 contains a listing of the number of manifest received on specific days during the period of 2001 to 2004.

As a condition for project approval, the Board of Supervisors placed a cap of 400 truck round-trips per day hauling hazardous waste to KHF. Prior to approval of the project there was no limit placed on the number of daily truck round trips.

No comment letters or oral remark prior to certification of the FSEIR asserted that 400 daily truck traffic baseline was an improper baseline because it did not represent actually realized conditions. Appellants did not challenge the truck traffic baseline as

failing to represent normally realized operating conditions in their letter setting forth the grounds for appealing the Board of Supervisors' decision approving the CUP.

In the trial court, appellants challenged the truck traffic baseline, arguing "the average of the 'peak operations' in the five year period of time before the notice of intent set a baseline that was not comparable to existing conditions." The trial court found the baseline objection waived because the issue had not been raised at the administrative level.

B. The baseline objection was not raised during administrative proceedings.

Appellants argue the FSEIR set an inflated daily truck traffic baseline that was improperly based on maximum peak, rather than normal operating conditions. CWCI replies that the trial court correctly determined appellants are barred from pursuing this claim because administrative remedies were not exhausted on this point. They assert that no commenter challenged the sufficiency of the evidence supporting the truck round-trips baseline and this baseline objection was not preserved in the appeal letter as is required in the Kings County Zoning Ordinance.[14] In response, appellants argue that commenters adequately raised the substance of the baseline issue prior to certification of the FSEIR and assert that the point was raised in their appeal letter. We agree with CWCI.

As we have previously explained, only objections to the proposed project presented, either orally or in writing, at the administrative agency level prior to certification of the EIR and project approval may be raised in a judicial proceeding challenging CEQA compliance. (Pub. Resources Code, § 21177, subd. (a).) Appellants

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[14] Kings County Zoning Ordinance No. 269.65, article 19, section 1911 provides: "Within eight (8) days following the date of a decision of the Planning Commission on a use application or an application for extension of a conditional use permit, the decision may be appealed to the Board of Supervisors by the applicant or any other directly affected person or party.… An appeal … shall state specifically in writing wherein it is claimed that there was an error or abuse of discretion by the Planning Commission or wherein its decision is not supported by the evidence in the record."

bear the burden of proving that each claimed ground of CEQA noncompliance was first articulated to the agency prior to certification of the FEIR and approval of the project. (*Porterville, supra*, 157 Cal.App.4th at p. 909.) "'[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.' [Citation.]" (*Ibid.*) The public agency must have had the opportunity to respond to the "factual issues and legal theories before its actions are subjected to judicial review." (*Id.* at p. 910) """It is no hardship … to require a layman to make known what facts are contested."""" (*Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1449.)

Appellants did not satisfy their burden of proving that administrative remedies were exhausted on their contention that the truck traffic baseline was improperly inflated. At no point did any commenter assert that the truck traffic baseline was improperly based on peak average rather than normal operating conditions. No one stated that 400 daily truck round-trips did not correctly reflect actually realized conditions at KHF. Although some commenters objected to the FSEIR's truck travel impacts analysis, no one challenged the accuracy of the 400 daily truck traffic baseline. None of the references appellants cited in their reply brief raised the substance of the point presented by appellants on appeal. For example, appellants cite a comment letter by CRPE dated June 19, 2008. The only mention of truck traffic in this letter is a statement that KHF has been accepting an average of 400 trucks per day and that a limit should be placed on the number of daily truck trips to reduce truck travel impacts. Other commenters asserted the baseline for all project impacts, including truck trips, should have been set at a level reflecting no KHF operations at all. But this is an entirely different factual and legal issue than the point presented on appeal.

Also, when local rules and procedures provide petitioners with the right to appeal from a decision of the planning commission and require the petitioners to specify the particular subject or grounds of appeal, the issue must be presented in the administrative

appeal to exhaust the point for subsequent judicial review. (*Tahoe, supra,* 81 Cal.App.4th 577, 591-594.) Appellants did not satisfy this requirement. The Kings County Zoning Ordinance requires one who appeals from the decision of the Planning Commission to specifically state in writing "wherein it is claimed that there was an error or abuse of discretion by the Planning Commission or wherein its decision is not supported by the evidence in the record." (Kings County Zoning Ordinance No. 269.65, art. 19, § 1911.) In the appeal letter, appellants raised a baseline issue, but it was entirely different than the point presented herein. They wrote, "Because the project is an expansion of an existing facility which has never been the subject of a master or programmatic EIR, the County has never analyzed or mitigated the project's impacts as compared to baseline conditions as they will exist if the project is not approved or conditions before the initial project commenced. It must, therefore, do so now." This was sufficient to preserve a claim that the baseline should have been set at a point prior to commencement of any operations at KHF but not to preserve a claim that 400 daily truck trips does not reflect normal operating conditions.

In sum, no commenter asserted in any fashion, however rudimentary, that the 400 daily truck traffic round-trips baseline was improperly inflated because it represents a peak average rather than normal operating conditions. This point was not contained in the appeal letter. Consequently, administrative remedies were not exhausted on this issue and we reject it on this basis. (*Banker's Hill, supra*, 139 Cal.App.4th at p. 282; *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1140 (*Evans*); *Tahoe, supra,* 81 Cal.App.4th at pp. 591-594.)

V. Administrative Remedies Were Not Exhausted on the Cumulative Impacts Claim.

Appellants argue the FSEIR "underestimated the project's true cumulative impact" because it "fails to include five onsite waste disposal units as related projects" and did not "summarize and analyze the related projects' combined cumulative effect." CWCI

argues administrative remedies were not exhausted on this point. Once again, we agree with CWCI.

Appellants bear the burden of proving the same ground of CEQA noncompliance that is argued in the judicial system was presented to the decisionmaker prior to certification of the FSEIR. "To advance the exhaustion doctrine's purpose '[t]he "exact issue" must have been presented to the administrative agency….' [Citation.]" (*Sierra Club v. City of Orange, supra*, 163 Cal.App.4th at p. 535.) An "isolated and unelaborated" remark that does not fairly present the same claim that is raised on appeal is insufficient to exhaust an issue. (*Banker's Hill, supra*, 139 Cal.App.4th at p. 282.) We have examined all of the administrative record citations that appellant listed in their reply brief allegedly proving this issue was presented prior to certification of the FSEIR. While various comments were made referencing the scope of the cumulative impacts analysis, no commenter stated that onsite current operations at KHF need to be considered as "related projects" for purposes of the cumulative effects analysis. Further, this point was not raised in the appeal letter to the Board of Supervisors. We specifically mention that the following comment that is contained in Pueblo's comment letter on the DSEIR, and repeated almost verbatim in the appeal letter, did not raise the same issue that is presented on appeal. The comment states: "The County's cumulative impacts analysis is flawed because it failed to take into account all on-site activities at the [KHF], including PCB disposal, as well as offsite facilities such as the truck transfer station in [KC]." The response to this comment states that "such activities are taken into account in the baseline background levels of truck traffic and emissions. [¶]… [S]uch emissions are considered as part of the baseline, existing air quality conditions in the County on which the impacts of the proposed project's toxic air emissions were analyzed." As evident from the response, this comment stated that the DSEIR improperly excluded onsite activities from the cumulative impacts analysis. It did not state that the five onsite waste disposal units now identified by appellants were required to be individually identified and

analyzed as "related projects" in the cumulative analysis section of the FSEIR. This comment, even when considered in conjunction with other comments listed by appellants in their reply brief, were insufficient to alert the Board of Supervisors to the concern raised on appeal.

Accordingly, we hold that because appellants' cumulative impacts claim was not articulated by a commenter and was not contained in the appeal letter, administrative remedies were not exhausted on this issue. Consequently, judicial review of the issue was forfeited and we reject it on this basis. (*Banker's Hill, supra*, 139 Cal.App.4th at p. 282; *Evans, supra*, 128 Cal.App.4th at p. 1140; *Tahoe, supra*, 81 Cal.App.4th at pp. 591-594.)

THE DEMURRERS TO THE CIVIL RIGHTS CAUSES OF ACTION WERE PROPERLY SUSTAINED WITHOUT LEAVE TO AMEND

I. Guiding Legal Principles and Standard of Review.

> "'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citation.] 'To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court.' [Citation.] '[We] may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court.' [Citation.]" (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999.)

II. Appellants Cannot Allege Facts Sufficient to Support a Cause of Action Under Government Code section 11135.

A. Facts.

In the fifth, sixth and seventh causes of actions contained in the first petition, appellants alleged that approval of the project violated section 11135. In the fifth cause of action appellants alleged that the "Board of Supervisors receives financial assistance from the State of California in an amount in excess of $10,000 in the aggregate per state fiscal year by grant, contract or otherwise." They also alleged, "It is a discriminatory practice for a recipient of state funds to make or permit selections of sites or locations of facilities that have the purpose or effect of excluding persons from, denying them the benefits of, or otherwise subjecting them to, discrimination under any program or activity. 22 CCR § 98101(j)(1). Petitioners are informed and believe that the County's decisions with respect to the placement and expansion of the hazardous waste dump are part of a pattern and practice of land use decisions that have resulted in the permitting, placement and expansion of the waste dump and other facilities that compromise the health and environment of the major Latino community in the area, while limiting the placement or expansion of such facilities in other areas." Appellants then alleged that residents of KC "will suffer significant and disproportionate environmental, cultural and cumulative impacts due to the unlawful nature of the County's approval" of the CUP and certification of the FSEIR for the project. The sixth cause of action incorporated these allegations and further alleged "failure to conduct a health survey has a discriminatory impact on the Latino residents of [KC]." The seventh cause of action incorporated these allegations and further alleged that the "public participation for the LAC and EIR processes was marred by procedural inequities," and the methods County employed during these processes "had a discriminatory impact on the predominately Spanish-speaking residents of [KC] by limiting their informed and meaningful public participation."

Relying on *People v. Levinson* (1984) 155 Cal.App.3d Supp. 13 (*Levinson*), the trial court determined that section 11135 prohibits discriminatory treatment of any person by those who are implementing state-assisted programs and activities. It found that the Board of Supervisor's decisions approving the CUP and certifying the FSEIR for the project was not part of a state-assisted program or activity encompassed within the scope of section 11135.

B. Section 11135 is limited to discrimination occurring within a specific, state-funded program or activity.

Appellants argue the trial court erroneously interpreted section 11135. In appellants' view, they were required only to allege facts supporting a claim that County received at least $10,000 in state assistance per fiscal year and that it engaged in actions or procedures that resulted in a discriminatory impact on KC residents based on race, ethnicity or national origin. We are not persuaded. As will be explained, the trial court properly sustained the demurrer without leave to amend because the scope of section 11135 is limited to discrimination occurring within a specific state-administered or state-funded program or activity.

Our primary task when construing a statute is to determine the Legislature's intent. (*Brown v. Kelly Broadcasting Co*. (1989) 48 Cal.3d 711, 724.) "To determine the meaning of a statute, we seek to discern the sense of its language, in full context, in light of its purpose." (*People v. Cooper* (2002) 27 Cal.4th 38, 45.) When presented with a statutory construction question, "'[t]he court turns first to the words [of the statute] for the answer.'" (*Brown v. Kelly Broadcasting Co.*, *supra*, 48 Cal.3d at p. 724.) "'[W]here the language is clear, courts must follow its plain meaning. [Citation.] However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.…'" (*In re Michael D.* (2002) 100 Cal.App.4th 115, 121.) The goal is to "'"'select the

construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.…'"""" (*Ibid*.)

Section 11135, subdivision (a) provides:

> "No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance of the state."

The plain language of section 11135 limits the statute's scope to discrimination occurring within a state-administered or state-funded program or activity. Our Supreme Court characterized section 11135 as "barring sexual orientation discrimination in any program operated by, or that receives any financial assistance from, the state." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 822, fn. 46.) State appellate courts have reached the same conclusion concerning the scope of section 11135. In *Martin v. City of Los Angeles* (1984) 162 Cal.App.3d 559, the court wrote that Government Code section 11135 and section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. § 794) "prohibit discrimination, in any program receiving federal or state financial assistance, on the basis of physical handicap or disability." (*Martin, supra,* at p. 562.) And in *Arriaga v. Loma Linda University* (1992) 10 Cal.App.4th 1556, the court explained that Government Code section 11135 "was designed as an *independent* source of protection for persons who are discriminated against in state-funded programs and activities." (*Arriaga, supra,* at p. 1561, decision superseded by statute as stated in *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 593-594.) Federal courts have reached the same conclusion concerning the scope of section 11135. *Darensburg v. Metropolitan Transportation Commission* (N.D.Cal. 2009) 611 F.Supp.2d 994 characterizes section 11135 as "prohibit[ing] discrimination in state-funded programs,

just as Title VI, 42 U.S.C. § 2000d, et. seq., prohibits discrimination in federally-funded programs." (*Id*. at p. 1041.)

Levinson, supra, 155 Cal.App.3d Supp. 13 is instructive. *Levinson* held that section 11135 did not require the municipal court to provide a hearing impaired driver with an interpreter at a traffic school. The court construed section 11135 with reference to the entire statutory scheme and considered contemporaneous administrative construction of the section. It concluded that "the apparent legislative purpose and intent in enacting Government Code section 11135 et seq. was to prohibit discriminatory treatment of any person on the basis of categories described in section 11135 only by those charged with effectuating programs or activities which receive directly or indirectly state support." (*Id.* at p. Supp. 18.) It explained:

> "That the Legislature intended only to prohibit discriminatory practices by those implementing state-assisted programs and activities is further evidenced by reference to the other statutory provisions contained within article 9.5. For example, both sections 11136 and 11138 limit operation of their provisions to 'a program or activity that is funded directly by the State or receives any financial assistance from the State'; section 11137 requires a state agency that administers a program or activity which has been determined to violate the provisions of this article to 'take action to curtail State funding in whole or in part to such contractor, grantee, or local agency.' Finally, the administrative regulations adopted pursuant to 11139.5, as previously noted, specifically defined 'recipient,' 'State support' and 'State financial assistance' in a manner which makes clear that a 'recipient' governed by the provisions of section 11135 must be one who receives 'State support' directly or through another recipient." (*Levinson, supra,* 155 Cal.App.3d at p. Supp. 18, fn. omitted.)

The *Levinson* court reasoned that although the municipal court seems to come within the administrative definition of a local agency, section 11135 did not require appointment of an interpreter at public expense because there was no evidence showing "any state assistance whatsoever to the traffic schools or to the municipal court to support or encourage in any manner exercise of its referral power under Vehicle Code section 42005." (*Levinson, supra,* 155 Cal.App.3d at p. Supp. 19.)

We are persuaded by *Levinson* and agree that the plain language of section 11135 limits the scope of the statute to discrimination that occurs under a specific, state-funded program or activity. Therefore, it is not necessary to consider extrinsic aids such as the legislative history, statutory scheme encompassing the statute and similar federal statutes. Nonetheless we mention that such extrinsic aids support our conclusion that the Legislature intended to prohibit discriminatory practices by those implementing state-administered, state-funded or state-sponsored programs and activities.

The legislative history for which appellants successfully sought judicial notice supports this interpretation of section 11135. The staff analysis of Assembly Bill No. 803 states this bill "would prohibit any state-funded program or activity from unlawfully denying benefits or unlawfully discriminating" on the basis of race, gender, or other enumerated basis. (Sen. Com. on Gov. Organization, staff analysis of Assem. Bill No. 803 (1977-1978 Reg. Sess.) as amended June 21, 1977.)

Other sections of this statutory scheme are consistent with the conclusion that the legislation was intended to prohibit discrimination in state run or state-funded programs and activities. Sections 11136 and 11138 are expressly limited to "a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state." (§§ 11136, 11138.) Section 11137 provides that the remedies for violating section 11135 include suspension or termination of funding by the awarding state agency. (See, e.g., *Levinson, supra*, 155 Cal.App.3d at p. Supp. 18.)

The similar federal statute prohibiting discrimination in federal programs and activities, section 540 of the federal Rehabilitation Act, requires a plaintiff to identify a specific program or activity that is receiving federal financial assistance in order to state a cause of action. (*Greater Los Angeles Council on Deafness v. Zolin* (9th Cir. 1987) 812 F.2d 1103, 1112; see also *Department of Transp. v. Paralyzed Veterans* (1986) 477 U.S. 597, 604, 610-612 (*Paralyzed Veterans*).) In *Paralyzed Veterans,* the Supreme Court rejected a claim that commercial airlines are part of a federally assisted program of

commercial air transportation simply because they make use of airports that accept federal funds. "It is by reference to the grant statute, and not to hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined." (*Paralyzed Veterans, supra,* 477 U.S. at p. 611.)

For all of these reasons, we hold the trial court correctly found that the scope of section 11135 is limited to discrimination occurring within a specific state-administered or state-funded program or activity.

C. Appellants have not shown that the pleading defect can be cured.

The allegations contained in the first petition failed to state a cause of action under section 11135 because they did not allege that the decision approving the CUP and certifying the FSEIR occurred within a specific state-administered or state-funded program or activity. It is not reasonably possible that this defect could be cured by amendment. KHF is a privately funded, privately run facility. The decision approving the CUP and certifying the FSEIR was not undertaken by the Board of Supervisors as part of a specific state-administered or state-funded program or activity. General allegations that County receives some general financial assistance from the state are inadequate as a matter of law. (See, e.g., *Paralyzed Veterans, supra,* 477 U.S. at pp. 604, 610-612.) Appellants' allegation that the challenged decision was part of a pattern and practice of discriminatory acts did not remedy this defect because appellants cannot show that the land use decisions comprising the alleged discriminatory pattern and practice each occurred within the context of a specific state-funded or state-administered program or activity. Accordingly, we hold the decision sustaining the demurrers to the fifth, sixth and seventh causes of action contained in the first petition without leave to amend was

not an abuse of discretion. To conclude otherwise would expand the scope of section 11135 beyond the intent of the Legislature.[15]

III. Appellants Cannot Allege Facts Sufficient to Support a Cause of Action Under Government Code section 12955, subdivision (*l*).

A. Facts.

The eighth cause of action contained in the first petition alleged unlawful discrimination in violation of section 12955, subdivision (*l*). The trial court sustained CWCI's demurrer to this cause of action with leave to amend.

In the fifth cause of action of the second petition appellants generally alleged that "County has failed to invest tax dollars in [KC] and the city is plagued by inferior municipal services." On information and belief, appellants alleged KC "receives fewer and poorer public services than other neighborhoods in Kings County. There are generally no sidewalks, inadequate or non-existent drainage services, poorly maintained roads, few streetlights, inadequate traffic control signs, inadequate law enforcement and 911 emergency services. These poor conditions adversely affect the housing conditions, enjoyment of residence, health, safety and dignity of [KC] residents." Appellants also alleged KC "has had little to no housing growth to provide new affordable units due primarily to the lack of water availability. These housing conditions are exacerbated by the proposed project, which will further reduce the quality of life for [KC] residents, interfere with their enjoyment of residence and disproportionately impact Latinos residing in Kings County." In the fifth cause of action appellants alleged that approval of

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[15] Since we have determined that appellants cannot state a valid cause of action under section 11135 because the alleged discriminatory challenged land use decisions did not occur within the context of a specific state-administered or state-funded program or activity, it is not necessary to decide if land use decisions such as the approval of the CUP for the project are included within the definition of programs and activities that is contained in California Code of Regulations, title 22, section 98010.

the project discriminated against them on the basis of race or national origin because it adversely affects "their housing conditions, denies housing opportunity, reduces property values, makes housing of comparable value unavailable to households in these groups to a significantly greater degree than to other households generally and/or otherwise makes housing unavailable as alleged above." Appellants also alleged that "[f]or at least 20 years, the Kings County Planning Agency and the Board of Supervisors have been engaged in a series of actions that have consistently favored [CWMI] instead of protecting the health, housing, enjoyment of residence, environment and well being of low-income, Latino and Spanish-speaking communities closest to the KHF." Appellants alleged these land use "decisions have created, maintained or exacerbated conditions that have an adverse affect on housing conditions in the community, reduce property values, interfere with enjoyment of residence, and have a disparate impact based on race, national origin and ethnicity."

The trial court sustained CWMI's demurrer to the fifth cause of action because no facts were alleged linking project approval to a decrease in housing opportunities in KC. The court reasoned: "By the terms of the statute itself only land use decisions limiting housing opportunities to persons due to their race, color, or national origin are made unlawful. This Court cannot expand the statute to encompass petitioners' concern as to the impact the waste facility expansion might have on the property values or the quality of life in for [*sic*] the residents in [KC]. These concerns are outside the regulatory [e]ffect of the statute."

B. Section 12955, subdivision (*l*) is limited to discrimination affecting the availability of housing.

Section 12955, subdivision (*l*) provides that it is unlawful

> "[t]o discriminate through public or private land use practices, decisions, and authorizations because of race, color, … national origin …. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the

> Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable. [¶] Discrimination under this subdivision also includes the existence of a restrictive covenant regardless of whether accompanied by a statement that the restrictive covenant is repealed or void."

Appellants argue that the trial court erred as a matter of law when it found section 12955, subdivision (*l*) was restricted to limitation of housing opportunities due to, inter alia, race, color or national origin. We are not convinced. The trial court correctly concluded that the plain language of section 12955, subdivision (*l*) limits its application to all public and private land use practices "that make housing opportunities unavailable." An action taken by an agency that is alleged to have adversely impacted intangible habitability interests and property values does not make dwellings "unavailable" within the meaning of section 12955, subdivision (*l*).

As we have explained, when presented with a statutory construction question, "'[t]he court turns first to the words [of the statute] for the answer.'" (*Brown v. Kelly Broadcasting Co., supra,* 48 Cal.3d at p. 724.) Reasonably read, the plain language of section 12955, subdivision (*l*) prohibits any land use practice, decision or law that discriminates against a person because of, inter alia, his or her race, color or national origin by making a housing opportunity unavailable. The clause "that make housing opportunities unavailable" which is preceded by a comma at the end of the second sentence in section 12955, subdivision (*l*) is a restrictive phrase that limits the scope of the section. The phrase "but is not limited to," that is contained in the second sentence of this subdivision is used to indicate that the list of exemplary particular land use actions is not exhaustive. The nonexhaustive list of particular land use actions does not operate to enlarge the scope of the section to include practices that do not make housing opportunities unavailable.

Since section 12955, subdivision (*l*) explicitly defines the type of discrimination that is prohibited, we reject appellant's suggestion that we apply the definition of

discrimination found in section 12927 for housing accommodations. CWCI persuasively argues that if the Legislature had intended section 12955, subdivision (*l*) to apply to land use practices that result in the provision of inferior terms, conditions, privileges, facilities or services in connection with housing accommodations, it would either have included such language in section 12955, subdivision (*l*), or specified that section 12955, subdivision (*l*) applies to housing accommodations.

Further, courts often look to cases construing analogous provisions of the federal Fair Housing Act (FHA), which is codified in 42 United States Code section 3601 et. seq. to interpret analogous provisions of the FHA. (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591; *Pack v. Fort Washington II* (E.D.Cal. 2009) 689 F.Supp.2d 1237, 1248.) The language of 42 United States Code section 3604(a) is analogous to Government Code section 12955, subdivision (*l*), not 42 United States Code section 3604(b). 42 United States Code section 3604(a) provides that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Several cases have restricted the scope of 42 United States Code section 3402(a) "to actions having a direct impact on the ability of potential homebuyers or renters to locate in a particular area, and to indirectly related actions arising from efforts to secure housing." (*Southend Neighborhood Improvement Asso. v. County of St. Clair* (7th Cir. 1984) 743 F.2d 1207, 1210 [failure to maintain adjacent properties does not fall within this section]; *Clifton Terrace Assoc., Ltd. v. United Technologies* (D.D.C. 1991) 929 F.2d 714, 719 [lack of elevator service is a matter of habitability, not availability].) Allegations that the value or habitability of a residence has been adversely affected are outside the scope of 42 United States Code section 3402(a). (*Jersey Heights Neighborhood Ass'n. v. Glendening* (4th Cir. 1999) 174 F.3d 180, 192-193 [no claim for decision to locate highway near a neighborhood]; *Tenafly Eruv Ass'n, Inc. v. Borough of*

Tenafly (3d Cir. 2002) 309 F.3d 144, 157, fn. 13 [challenge to removal of religious objects from telephone poles does not state a claim]; *Campbell v. City of Berwyn* (N.D.Ill. 1993) 815 F.Supp. 1138, 1143-1144 [allegation of discrimination in the termination of police protection services at plaintiffs' residence does not state a claim].) *Cox v. City of Dallas* (5th Cir. 2005) 430 F.3d 734 (*Cox*) is particularly instructive. In *Cox*, homeowners sued the City of Dallas under 42 United States Code section 3604(a) based on an allegation that the city failed to effectively police the operation of an illegal dump near their homes because of racial discrimination. The federal court held that these allegations were not sufficient to state a claim of action under this section because it did not make unavailable or deny a dwelling to a person because of race. "The failure of the City to police the Deepwood landfill may have harmed the housing market, decreased home values, or adversely impacted homeowners' 'intangible interests,' but such results do not make dwellings 'unavailable' within the meaning of the Act." (*Id*. at p. 740.)

Based on the plain language of section 12955, subdivision (*l*) and cases interpreting the FHA's analogous provision, we hold that the trial court properly determined that the scope of section 12955, subdivision (*l*) is limited to discrimination that makes housing unavailable.

C. Appellants have not shown that the pleading defect can be cured.

As we have explained, the trial court properly interpreted the scope of section 12955, subdivision (*l*). It correctly determined that the allegations in the amended pleading did not state a valid cause of action under this section because they focused on the habitability of residences in KC, not the availability of housing. Appellants' allegations amount to a claim that approval of the CUP for the project adversely affected their intangible property values and habitability interests. We agree with CWCI that appellants allegations reflect their "continued dissatisfaction with the County and current conditions in [KC]." This is outside the scope of section 12955, subdivision (*l*). Appellants cannot allege any factual nexus between approval of the CUP for the project

and existing conditions in KC because these conditions predate project approval. Appellants have not shown that they could allege facts supporting a claim that approval of the project resulted in a decrease in housing opportunities or housing availability in KC.

In addition, appellants have not alleged facts sufficient to show that County's land use approval practices, including the decision by the Board of Supervisors to approve the project, have resulted in a significantly adverse or disproportional impact on Latinos by making housing opportunities unavailable. No factual nexus was alleged between County's land use approvals and a specific effect on housing availability. At most, appellants have alleged an inference of discriminatory housing impacts. This is insufficient to support a prima facie case for disparate impact housing discrimination under section 12955, subdivision (*l*). (See, e.g., *Gamble v. City of Escondido* (9th Cir. 1997) 104 F.3d 300, 306-307.)

Appellants were provided with an opportunity to cure the defective pleading and they failed to do so. It is not reasonably possible that the defect could be cured by further amendment. Therefore, we hold that the decision sustaining the demurrer to the fifth cause of action in the second petition without leave to amend was not an abuse of discretion.[16]

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Kings County Board of Supervisors and Chemical Waste Management, Inc.

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16 This conclusion obviates any need to address CWCI's contention that appellants were required to exhaust administrative remedies on the section 12955, subdivision (*l*) claim and that that they failed to satisfy this requirement.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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FRANSON, J.